Standards for Court Approval of Attorney Fee Applications

The Probate Court has formulated the following standards to assist attorneys with drafting fee applications in typical probate and guardianship cases. By understanding how the Court evaluates fee applications, attorneys will be better able to comply with Court standards, reducing the need for consultations between attorneys and Court personnel regarding problems with specific applications. These standards are not absolute rules; the Court will make exceptions in particular circumstances as fairness and justice demand. In formulating and revising these standards, the Court has considered not only the Texas Estates Code, the Texas Rules of Disciplinary Procedure, and applicable case law, but also comments from the Judicial Liaison Subcommittee of the Austin Bar Association's Probate and Estate Planning Section. The Court appreciates opportunities like this one to work closely with the Bar to further the administration of justice in Travis County.

I. Attorney's Fees

It is the Court's duty to ensure that estates of decedents and wards pay only for "reasonable and necessary" attorney's fees and expenses. See Estates Code § 352.051 (decedent's estates) and § 1155.102 (guardianship estates). The factors to be considered in determining the reasonableness of attorney's fees are set forth in Rule 1.04 of the Texas Rules of Professional Conduct. These include the time and labor involved in the case, the difficulty or novelty of the work performed, the customary hourly rate of the attorney requesting the approval of fees, and the customary hourly rates of attorneys with similar education and skills performing similar services.

A. Court-Approved Fees for a Fiduciary's Attorney

The table below sets forth what the Court believes are appropriate rates for court-approved fiduciaries' attorney's fees for work performed on or after November 1, 2010. Attorneys should be aware, however, that the Court may depart from these rates in certain circumstances. For example, a particularly difficult probate or guardianship matter may require special expertise that should be compensated at an hourly rate higher than the attorney's standard hourly rate under the Court's guidelines. Similarly, the Court will adjust an attorney's hourly rate downward in situations in which the estate is so small that the requested fee would consume most of the estate. Moreover, the Court will reduce an attorney's fee when the time the attorney expends on a particular matter far exceeds the amount normally expended by attorneys on similar matters or, in those rare instances, when it comes to the Court's attention that a lawyer is not performing up to the standards of those licensed for an equivalent length of time. Be advised that it is a particular lawyer's **experience in probate and guardianship law** that determines his or her hourly rate, not the number of years the lawyer has been licensed.

To assist the Court in determining a particular lawyer's hourly rate, each attorney who is new to the practice of probate or guardianship law before the Court should submit his or her resume with that lawyer's first fee application. Similarly, an attorney who believes that his or her experience before the Court qualifies for a rate increase should submit a letter to the Court detailing the reasons that such an increase is appropriate.

Years Practicing Probate and Guardianship Law	Court-Approved Rate
0 – 2 years	up to $165/hour
3 – 5 years	$165 – 195/hour
6 – 10 years	$195 – 250/hour
11+ years	$250 – 350/hour

In determining how lawyers will be paid within the practice categories above, the Court will consider the extent of the lawyer's experience in the area of law involved as well as Board Certification in Probate and Estate Planning. In the 11+ category, the Court will pay the highest rate to those few lawyers whose experience and mastery of probate, estate planning, and guardianship law qualify them as experts in these areas.

B. Attorney Ad Litem and Guardian Ad Litem Fees

Formulating standards for the compensation of reasonable attorney's fees for an attorney ad litem or guardian ad litem is challenging not only because of the variety of factors set forth in Rule 1.04 of the Texas Rules of Professional Conduct, but also because of certain factors over which the Court has limited control.

In the case of court-appointed counsel for indigent parties, for example, the Court must heed Travis County budgetary considerations. Since an estate is unavailable or unable to pay fees, the Court approves fees under a budget approved and overseen by the Commissioners Court. Thus, attorneys who are assigned Court appointments in probate and guardianship cases with an indigent party should not expect to be reimbursed at their regular hourly rates because the Court's annual budget limits the amounts it can pay for such services. Ordinarily, the Court compensates attorneys ad litem involved in County-pay cases a total of $300 for the first three hours of reasonable and necessary work and then at a rate of $85 per hour for reasonable and necessary time over three hours. The hourly rate for guardians ad litem in indigent cases is similar to that paid to attorneys ad litem, although it is common for the total fees to be higher for guardians ad litem, especially when the guardian ad litem initiates the Court proceedings.

When an ad litem can be compensated from a solvent estate, the Court's award of reasonable attorney's fees usually begins with the Court determining if the representation provided by – **and reasonably required of** – the ad litem is "typical" or "normal." In a "typical" or "normal" case, the Court ordinarily awards **total** fees of $450 to an attorney ad litem. In determining whether representation is "typical" or "normal," the Court considers matters such as the type of case, the complexity or potential complexity of the case in terms of the number of parties and issues involved, and any unusual circumstances. These factors determine the extent to which the fee allowed should be more than, equal to, or less than the typical fee. In general, attorneys ad litem and guardians ad litem should expect to receive a fee that is less than the fee of the applicant's attorney unless special factors are present.

C. Fees when an Attorney is also the Fiduciary

In those rare situations in which the Court appoints an attorney as a fiduciary in a guardianship or administration, the attorney normally must elect either to seek payment calculated on the statutory probate or guardianship commission formula or to obtain reimbursement for attorney's fees. If the guardianship or administration is particularly complex, the Court may approve dual compensation upon request of the attorney, preferably at the time of appointment. Dual compensation would include payment at the appropriate hourly rate for legal work done in the case and a separate commission for work done as a personal representative or as a guardian under § 352.002 or § 1155.001-1155.008 of the Estates Code, respectively. To be entitled to dual compensation, the attorney fiduciary must adhere to the following guidelines:

1. There must be full disclosure of the attorney-fiduciary's request for dual compensation at the time of appointment or upon motion and hearing if the request for dual compensation is made later. If the request is after the time of appointment, notice of the motion and hearing shall be given to all interested parties who have made an appearance in the case.

2. The attorney-fiduciary must keep meticulous time and expense records, carefully segregating legal and non-legal work.

3. Under Texas law, an attorney-fiduciary must seek only fiduciary compensation for guardian/personal representative services and may seek attorney's fees **for legal services only**. Applications for attorney's fees should give a detailed account of the **legal services** the attorney-fiduciary rendered to the probate or guardianship estate. Attorney-fiduciaries will not be paid attorney's fees for **fiduciary services**. For example, they will not be paid an attorney-fee rate for obtaining a bond, gathering estate assets, or making health care decisions for a ward of the Court. Should the attorney believe the statutory compensation formula as applied to a particular estate or guardianship is unreasonably low (see EC §§ 352.003 and 1155.006), then he or she should submit, with the annual or final account, contemporaneous time records of the fiduciary services for which additional hourly compensation is requested above the statutory fee. Note that the hourly fee approved by the Court for attorney fiduciary services (between $25-60 per hour, depending on the complexity) is significantly less than the Court-approved legal rates for attorneys.

D. Fees When Guadianship Case Filed in Bad Faith or Without Just Cause

Effective January 1, 2014, Estates Code Sec. 1155.054(d) provides: "If the court finds that a party in a guardianship proceeding acted in bad faith or without just cause in prosecuting or objecting to an application in the proceeding, the court may require the party to reimburse the ward's estate for all or part of the attorney's fees awarded under this section and shall issue judgment against the party and in favor of the estate for the amount of attorney's fees required to be reimbursed to the estate."

The Court suggests that all counsel mention this wholly new statute in every initial interview with a potential guardianship applicant or other party. Bad faith henceforth can be penalized, and the time to recognize that is before a bad faith application or objection gets filed.

II. Paralegal/Legal Assistant Charges

The Court recognizes that many attorneys rely on paralegals and legal assistants for gathering information and reviewing and preparing documents. The Court will approve reimbursement for reasonable and necessary "**specifically delegated substantive legal work**"[1] that is done by a paralegal. Because "substantive legal work" does not include clerical or administrative work, **this court will not allow recovery of paralegal time for such non-substantive, secretarial services even if such services are performed by paralegals or legal assistants (or attorneys).** *See, e.g., Gill Sav. Ass'n v. Int'l Supply Co., Inc.*, 759 S.W.2d 697, 705 (Tex. App. Dallas 1988, writ denied). Secretarial services are included in the attorney's overhead, for which an attorney is reimbursed as part of his or her hourly rate.

The Court will reimburse an attorney **for paralegal/legal assistant work** at a rate between $50 and $95 depending upon the following factors:

- certification as a paralegal by the NALA, or recognition as a PACE-Registered Paralegal, or successful completion of a legal assistant program, or possession of a post-secondary degree (B.A. degree or higher);
- number of years experience in the probate, estate planning, and guardianship field;

[1] In 2005, the State Bar of Texas Board of Directors and the Paralegal Division of the State Bar of Texas defined a paralegal as a person whose work involves "the **performance, under the ultimate direction and supervision of a licensed attorney, of specifically delegated substantive legal work,** which work, for the most part, requires a sufficient knowledge of legal principles and procedures that, absent such a person, an attorney would be required to perform the task." http://www.texasbar.com/Content/NavigationMenu/ForLawyers/Committees/Paralegal_Committee.htm (emphasis added).

- Texas Board of Legal Specialization certification in Estate Planning and Probate Law; and
- number of continuing legal education courses in probate, guardianship, and estate planning attended in the past three years.

A legal assistant certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization is eligible for a $25 per hour increase above the hourly rate the Court would otherwise approve. In appropriate circumstances, a paralegal/legal assistant with special qualifications, such as a masters degree in accounting or a law-related field, may also be eligible for a $25 per hour increase. Further, if particular litigation requires special expertise that a paralegal/legal assistant is qualified to perform and has performed in the past, the Court might approve up to a $25 per hour increase above the court's standard rate, but only if a request in writing is made to the Court **before** work is done.

To better evaluate these factors in determining the appropriate rate for each paralegal/legal assistant, the Court requests that attorneys submit to the Court the resumes of each paralegal/legal assistant for whose work they will seek reimbursement from the Court and a short statement of any relevant qualifications that do not appear on the resume. The Court will maintain these resumes and information sheets. If an attorney believes that the billing rate for a paralegal or legal assistant should increase because of newly acquired credentials, the attorney should submit a letter to the Court detailing the reasons that such an increase is appropriate.

III. Billing

A. Minimum Billing Increments

We ask attorneys to bill in .1 hour increments. The Court doesn't permit .25 hours as a minimum billing increment because many tasks (opening and reviewing a bill, sending a short email, etc.) take only a few minutes. It overreaches to always claim 15 minutes for anything you do. The Court can't find that .25 hours is universally reasonable and necessary when the task may have taken considerably less time.

B. No Block Billing

If the application lists a series of legal services as one entry, and the Court can't tell how long each service took, the attorney will be required to file an amended application with this information.

C. Timing of Application

The Court understands that the cash-flow situations at law firms differ, leading some firms to bill more frequently than others. In general, the Court does not want to direct the timing of fee applications other than to suggest its preference that bills be submitted at least once a year. But do note that the Court will not approve fees that are beyond the statute of limitations for collecting those fees.

D. Content of Fee Application

To ease its review of fee applications, the Court asks attorneys to include the following in all of their fee requests:

- **The title (or subtitle) of <u>both</u> the application and the proposed order should indicate the time period covered by the bill.** For example, "Order Approving Attorney Fees, March 1, 2013 to March 31, 2013."

- Clearly identify all of the following for each billed service:
    1. The date the service was rendered.
    2. The attorney or the paralegal/legal assistant performing the service. Do not use initials unless the application identifies which initials correspond to which individuals.
    3. A sufficiently detailed description of the service.
    4. The time involved.
    5. The the amount billed for that service.
- Somewhere in the application, indicate the hourly rate for each attorney or paralegal/legal assistant whose services are being billed.

E. Proposed Orders

- **Proposed orders <u>must</u> include blanks where the amounts to be awarded will go.** The Court is going to think about what is reasonable and necessary. It will not approve a pre-printed amount and will ask you to re-submit a proposed order with blanks.
- As noted above, indicate the time period covered by the bill **in the title (or subtitle)** of the proposed order.

IV. Guidelines for Specific Types of Charges

A. Travel

In determining how to reimburse attorneys for travel time, the Court follows two general rules. First, travel time from an attorney's office to the courthouse to attend hearings is normally reimbursed at the attorney's approved rate. If, however, the attorney resides or has an office outside the Central Texas area, the attorney's travel time to the courthouse from his home or office will be reimbursed at half of the attorney's approved rate. That attorney will also be entitled to mileage reimbursement at the I.R.S. rate.

Second, the Court expects that most clients will ordinarily visit their attorney's offices for consultations and document execution. Therefore, the Court will reimburse attorney travel-time to visit clients only (1) if that client is a ward and the attorney is the Court-appointed guardian, guardian ad litem, or attorney ad litem or (2) if some emergency or other special circumstance requires the attorney to visit the client at home. Such special circumstances should be described in the fee application to be reviewed by the Court. If the Court approves the visit, the Court will reimburse attorneys at their full, approved rate or at the appropriate County-pay rate in indigence cases.

B. Legal Research

The Court expects attorneys who practice in this Court to be familiar with general probate and guardianship matters; therefore, the Court will not reimburse attorneys for basic legal research in these areas. Thus, for example, the Court will not reimburse an attorney for research into the application requirements for the probate of a will as muniment of title, an independent or dependent administration, a determination of heirship, or a guardianship. However, the Court will reimburse attorneys for costs associated with necessary and reasonable legal research conducted to address novel legal questions or to respond to legal issues posed by the Court or opposing counsel.

The Court considers the contract costs of computerized legal research (such as Westlaw and Lexis) to be part of an attorney's overhead, as are the costs of a hard-copy library. Consequently, the Court does not reimburse for those costs.

C. Preparation of Fee Applications

It is the general practice of attorneys to include in their overhead the cost of generating and reviewing billing invoices and of drafting and mailing the cover letters that accompany the invoices. Even though the Court is cognizant that Court authority must be obtained for the approval of fee applications in certain circumstances, the Court believes that the estate of a decedent or ward should not be taxed with the attorney's billing costs. Therefore, this Court, like the majority of statutory probate courts in the state, will not reimburse attorneys for the costs of preparing invoices and the fairly standardized fee applications and orders that accompany them.

D. Conversations with Court and Clerk Staff

The Court's staff is a vital source of information and assistance to the legal community. The Court is proud of its accessibility to the lawyers and the public that have questions about uncontested matters – procedural and substantive – in probate and guardianship law. The Court and its staff attempt to answer these questions and to provide guidance where appropriate. Bearing in mind that the Court requires all personal representatives to have counsel, the Court does not believe it appropriate for the Court to have discussions with personal representatives outside the presence of their counsel. Please do not suggest to a client that it is appropriate to call the Court for a consultation or an explanation of what is going on in the estate being administered by that client. Again, the Court and its staff have no problem discussing these matters with an attorney.

However, we do not think it is appropriate to charge an estate for the time the Court spent providing the personal representative's attorney with assistance. Nor will the Court reimburse attorneys for time spent in discussions with the Court Auditor aimed at correcting deficiencies in the client's accountings. Of course, if a member of the Court staff requests an attorney to provide information not ordinarily contained in properly drafted pleadings, the Court will reimburse the attorney for the time spent responding to that request. Or, if the fee application reveals special circumstances requiring the attorney to seek guidance from the Court, the Court will award attorney's fees. For example, the Court will reimburse attorneys for communications with the Court regarding the need for corrective action when a guardian, administrator, or an attorney dies during an ongoing estate.

It continues to be the long-standing practice of this Court not to reimburse attorneys from probate and guardianship estates for calls to the Clerk's office. While the Court understands that a problem arising in the Clerk's office may frustrate an attorney, the Court does not believe that an estate should be required to pay for the attorney's time spent redressing such a problem. The Court urges attorneys to communicate concerns directly to the Clerk's office so that systemic improvements can be made to prevent the recurrence of any such problems. Moreover, the Court urges adherence to the common practice of attaching to all applications a copy of the proposed order and a self-addressed, stamped envelope. This step, coupled with payment of the correct filing and posting fee, if required, will help ensure that attorneys receive conformed copies of all proposed orders and will reduce the necessity for calls to the Clerk's office to check on the status of a particular order.[2] Alternatively, the attorney can check

[2] Often, the Court receives calls from an attorney's office wondering if it has signed a particular order. Many times these calls concern orders that have a time requirement regulating when the Court can address them. It is a waste of both the attorney's and the Court's resources to have an attorney call the Court for the status of orders for which a statutorily mandated time requirement has not run. Be assured, the Court makes every attempt to promptly sign orders when they are ripe for review. At least once or twice a day, the Court sends the signed orders and related pleadings to the Clerk's offices for filing. The Court knows that attorneys can have difficulties getting copies of some orders and

Probate Court records on the Clerk's website (http://tccweb.co.travis.tx.us/) using the case name or cause number, and can review and print copies of all scanned pleadings and orders.

E. Copies and Faxes

From its experience reviewing fee applications and from consultation with commercial copying companies, the Court recognizes that attorneys pass through different costs to their clients and that significant variation exists in the price charged for copies, ranging from attorneys who include copies as overhead reimbursed as part of their hourly rate to those charging $.30 per page. Cognizant of the need for uniformity in reimbursements for copy costs and mindful of the rates for commercial copying in Travis County, the Court has determined that it will reimburse attorneys up to $.15 per page. Copies made by the Clerk's office will be reimbursed at the rate charged by the Clerk if the fee application indicates this fact. In no case, however, will the Court pay any copying costs not accompanied by a statement of the charge per page and the number of copies.

Fax charges have presented a unique problem for the Court. Some attorneys charge for faxes, others do not. Of those that do charge, some attorneys charge a set fee based on the fact that a fax was sent, others charge on a per-page basis for faxes sent. Some attorneys charge a set fee based on the fact that a fax was received, others charge on a per-page basis for faxes received. Some attorneys charge only for long distance faxes, others charge for both long distance and local faxes. Commercial entities that fax documents set their fees based on external market factors and a profit motive not usually associated with the recovery of expenses in the practice of law. Faced with these myriad and frustrating variations in pricing, the Court has determined that the best practice is to consider faxes as a part of attorney overhead and to include it as part of an attorney's hourly rate. Therefore, the Court will not pay for fax transmissions. It will, however, pay long-distance charges associated with long-distance faxes in the same manner it reimburses long-distance phone calls (for which it will pay the actual long distance charges).

V. Costs Necessitated by Misfeasance or Malfeasance

The Court does not believe that guardianship or probate estates should be charged with any attorney time or mileage for resolving problems or attending hearings necessitated by the misfeasance or the malfeasance of the client or attorney. For instance, if a personal representative sells property without Court approval and there are attendant costs associated with rectifying the situation, the Court believes the personal representative should be personally responsible for any added expense. Likewise, show-cause hearings fall within this exception, and the attorney or the client will be responsible for all costs associated with attendance at the hearing, including service and filing fees assessed by the Clerk.

VI. Court Action on Fee Applications

The Court holds all attorney-fee applications for 10 days to give other parties an opportunity to file objections to those applications. If no objections are filed, the Court will consider the applications on submission and without a hearing, unless the amount of fees requested is significant or the Court has

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that they are often told that the orders are "with the Court." However, it is not the practice of the Court to keep signed orders or to ignore pleadings needing court action. Far, far, more often than not, a signed order is in the Clerk's office despite a deputy's protestations to the contrary. The Court has no control over this problem. The Court can only sign orders and deliver them to the official record keeper. If an attorney has problems obtaining copies of orders, the Court suggests that the attorney deal with the appropriate authority at the Clerk's office.

questions about the propriety or reasonableness of the fees. In such cases, the Court will request that the application be set for a hearing.

Fee requests should be filed as applications for payment of fees or for reimbursement of fees (if already paid by the representative) **and not as claims against the estate**. The Court has found that a representative is likely to rubber stamp his or her attorney's fee request without exercising independent judgment, resulting in an inherent unfairness to the estate. If the representative chooses to disregard the Court's policy and file the fee application as a claim, the Court will – in every case – require a hearing under Estates Code § 355.056 and § 1157.056.